Garcia v. Microsoft Corporation Doc. 17 Att. 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANCISCO GARCIA individually, on behalf of his minor child SILVARIO GARCIA and all others similarly situated	)	Case No. 1:07-CV-2363 TCB
Plaintiff(s),	)	
vs.	)	
MICROSOFT CORPORATION	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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I. INTRODUCTION

Defendant Microsoft Corporation ("Microsoft") submits this brief in support of its motion to transfer venue. As explained below, this case is governed by a valid and enforceable contractual forum selection clause under which Plaintiff is bound to "the exclusive jurisdiction and venue of courts in King County, Washington, U.S.A. in all disputes arising out of or relating to the use of Xbox Live." Under 28 U.S.C. § 1404(a), the parties' agreement to set venue exclusively in another judicial district "figures centrally in the district court's calculus," *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988), and the remaining factors under section 1404(a) – including the location of witnesses and documents – also strongly weigh in favor of transfer.

Plaintiff proceeds on behalf of his minor child, who agreed beforehand to the litigation of any disputes in King County, Washington, where Microsoft's headquarters sit and where Microsoft made the key business decisions relating to its Xbox LIVE service. Under section 1404(a), there are no countervailing factors sufficiently weighty to permit retention of this litigation in this District. The Court should therefore transfer this case to the United States District Court for the Western District of Washington as provided in the Xbox LIVE agreement.

II. PROCEDURAL HISTORY AND FACTS

A. Procedural History

On August 23, 2007, Plaintiff Francisco Garcia, on behalf of his minor child

Silvario Garcia, commenced this action in Fulton County Superior Court. Plaintiff served the Complaint on Microsoft on August 29, 2007, and on September 27, 2007, Microsoft timely removed the Complaint to this Court under 28 U.S.C. § 1441(a) and the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of Title 28 of the United States Code).

B. Facts

Plaintiff alleges that on or about October 2005, his minor child Silvario used Plaintiff's debit card to purchase a one-year subscription to Microsoft's Xbox LIVE interactive gaming service. Compl. ¶ 8.[1] According to the Complaint, the subscription was automatically renewed for a second one-year term on or about October 2006. *Id.* ¶ 9. Microsoft refunded Plaintiff's subscription fee on or about October 6, 2006. *Id.* ¶ 11.

Microsoft's records are substantially in agreement with Plaintiff's allegations regarding the inception and renewal of the subscriptions, as well as the refund related thereto, and to the extent there are differences they do not materially affect this motion. According to Microsoft's records, an account was opened in the name of Francisco Garcia, of Roswell, Georgia, on June 28, 2005. *See* Declaration of Ben Smith ¶ 5 & Ex. A thereto (a true and correct of copy of the Smith Declaration is attached hereto as Exhibit "1"). Microsoft's records further reflect that Mr. Garcia's subscription was renewed on September 29, 2005, and renewed again one year later, on September 28, 2006. *See* Smith Decl. ¶ 6 & Ex. A thereto. Finally, Microsoft's records reflect that the subscription was canceled on October 4, 2006, with a refund of the September 28, 2006 subscription fee being made on October 4, 2006. *See* Smith Decl. ¶ 6 & Ex. A thereto.

As the Smith Declaration explains, whether the subscription at issue in this case is regarded as being opened, as Microsoft's records reflect, on June 28, 2005, or on the renewal date of September 29, 2005 in line with the allegations of the Complaint, the subscription could not be opened unless the subscriber represented in writing that he was at least 18 years of age. *See* Smith Decl. ¶¶ 8-9 and Ex. B thereto. The subscriber was required to click "Accept" during the Xbox LIVE online registration process, expressly manifesting his acceptance of the Xbox LIVE Terms of Use. *See* Smith Decl. ¶ 8; *see also* Compl. ¶ 8 (admitting that "[t]his contract was entered into via the internet with an XBOX [sic] computer"). Those Terms of Use, attached as Exhibit B to the Smith Declaration, included the following requirement as a condition of opening an Xbox LIVE account:

You represent that you are at least 18 years old, and all information that

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[1] Unless otherwise stated, Microsoft will use "Plaintiff" to denote Francisco Garcia, not his son Silvario.

you submit is correct.

See Smith Decl. Ex. B at ¶ 1. Section 16 of the Terms of Use also contained the following agreement to litigate any disputes relating to the Xbox LIVE service in King County, Washington:

> 16. CHOICE OF LAW AND LOCATION FOR RESOLVING DISPUTES. Claims for enforcement, breach or violation of duties or rights under this Agreement will be adjudicated under the laws of the State of Washington, without reference to conflict of laws principles. All other claims, including, without limitation, claims under or for violation of state consumer protection laws, unfair competition laws, and in tort, will be adjudicated under the laws of your state of residence in the United States. *You hereby irrevocably consent to the exclusive jurisdiction and venue of state or federal courts in King County, Washington, USA in all disputes arising out of or relating to the use of the Service.*

See Smith Decl. Ex. B at ¶ 16 (emphasis added).[2]

C. Plaintiff's Claims

Plaintiff makes three claims with regard to the Xbox LIVE contract. First, proceeding entirely upon information and belief, Plaintiff alleges that Microsoft "fraudulently induced a contractual relationship for XBOX Live [sic] services with" his son Silvario, by charging subscription fees "while knowing, upon information and belief, that such initial Xbox Live [sic] subscriptions contracts are unenforceable against minor Class Members pursuant to the well-established 'Infancy Doctrine,' found in O.C.G.A. §13-3-20, wherein contracts with minor children are unenforceable." Compl. ¶ 24.

Second, Plaintiff makes the same allegations of fraudulent inducement and unenforceability with regard to the automatic renewal of the Xbox LIVE contract in October 2006. Compl. ¶ 25.

Third, Plaintiff claims that his "multiple-year" contract is unenforceable for violation of the Statute of Frauds, O.C.G.A. § 13-5-30(5), because it was allegedly not in writing. Compl. ¶ 26. Plaintiff alleges claims for fraudulent inducement, conversion, fraud and deceit, deceptive trade practices, unjust enrichment, attorney's fees, and punitive damages. Compl. ¶¶ 23-58.

Plaintiff seeks to litigate his case as a class action on behalf of two proposed classes. First, Plaintiff seeks to represent "all others similarly situated . . . who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such contracts have been entered into by minor children in violation of O.C.G.A. §13-3-20." Compl. ¶ 13.

Second, Plaintiff seeks to represent "all others similarly situated who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying

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[2] The Terms of Use in effect when the subscription was renewed on September 28, 2006, were materially to the same effect. *See* Smith Decl. ¶ 10 & Ex. C.

automatic XBOX Live [sic] subscription renewals of any length, where such multiple-years contracts with adult Class members are not in writing as required under the applicable Statute of Frauds, found in O.C.G.A. §13-5-30(5)." Compl. ¶ 14.

D. Plaintiff's Agreement To Litigate In Washington

Microsoft does not concede that Plaintiff has stated a claim, and it contemporaneously moves to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). Indeed, a fair reading of the Complaint suggests no more than the simple fact that Silvario used his father's debit card to open an Xbox LIVE account, a process that means Silvario misrepresented that he was an adult in order to enter into the contract. Without misrepresenting his age, Silvario would have been unable to open an Xbox LIVE account. *See* Smith Decl. ¶¶ 8-9 & Ex. B thereto.

Irrespective of the merits of Plaintiff's "fraudulent inducement" and other claims, however, the Court should as a threshold matter transfer this action to the proper venue: King County, Washington, as required in the Xbox LIVE user agreement that governs the relationship between the parties. *See* Smith Decl. Ex. B at ¶ 16. As explained below, because Silvario represented that he was over 18, Plaintiff cannot now avoid the obligations – including the requirement that this dispute be litigated in King County, Washington – on grounds that Silvario is a minor. Nothing alleged in the Complaint, and nothing that Plaintiff can assert in response, can detract from the clear expression of the advance agreement to litigate this dispute exclusively in Washington. The Court should uphold that agreement and transfer this case to the Western District of Washington, where the substance of Plaintiff's claims can be litigated as provided under the Xbox LIVE Terms of Use.

III. ARGUMENT: THE COURT SHOULD TRANSFER THIS CASE TO THE WESTERN DISTRICT OF WASHINGTON.

A. The Forum Selection Clause Requiring That Plaintiff Litigate This Dispute In Washington "Figures Centrally" Among The Factors Considered On A Section 1404(a) Motion To Transfer.

28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Here, the Western District of Washington is the district in which Microsoft, a Washington corporation, maintains its principal place of business, *see* Compl. ¶ 4, and is clearly a district where this case could have been brought. 28 U.S.C. § 1391(a), (c). In determining whether to transfer a case under section 1404(a), the Court must, as suggested by the statute, weigh two sets of interests: (1) the convenience of parties and witnesses, and (2) the interest of justice. *P & S Bus. Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (quoting *Stewart Org.*, 487 U.S. at 29).

The forum selection clause in the contract governing the relationship of the parties requires Plaintiff to litigate his dispute only in courts located in King County, Washington. And where, as here, the defendant invokes a forum selection clause on a section 1404(a) motion, the Court begins its analysis by examining the validity of the clause and the "opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). If the forum selection clause is valid, it will, under *Stewart*, "*figure[] centrally* in the district court's calculus." *Stewart Org.*, 487 U.S. at 29 (emphasis added).

As the Supreme Court explained in *Stewart Org.*, "[t]he flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Id.* at 29-30. In fact Justice Kennedy, concurring in *Stewart Org.*, urged that a valid forum selection clause be "given controlling weight *in all but the most exceptional cases*." *Id.* at 33 (emphasis added); *see also P & S*, 331 F.3d at 807 ("Thus, while other factors might 'conceivably' militate against a transfer . . . the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors.") (quoting *Ricoh*, 870 F.2d at 573).

In the present case, the forum selection clauses in effect throughout the duration of Silvario Garcia's contractual relationship with Microsoft set exclusive jurisdiction in King County, Washington, and that private, advance expression of the parties' agreement means that little deference is owed to the different forum where Plaintiff later chose to file suit. *Ricoh*, 870 F.2d at 573 ("In attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff's right to choose its forum; *rather, the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue*. In such cases, we see no reason why a court should accord deference to the forum in which the plaintiff filed its action.") (emphasis added). The Court should accordingly transfer this case to the Western District of Washington.

B. The Xbox LIVE Forum Selection Clauses Are Valid.

When determining the validity of a contractual forum selection clause, the relevant standards are those that the Supreme Court set in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The Eleventh Circuit summarized those standards succinctly in *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998), where it explained that contractual choice of forum provisions:

> will be found "unreasonable under the circumstances," *Bremen,* 407 U.S. at 10, 92 S.Ct. at 1913 (internal quotations omitted), and thus unenforceable only when: (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the provisions would contravene a strong public policy.

Lipcon, 148 F.3d at 1295-96 (citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991); *Bremen*, 407 U.S.at 15-18; *Roby v. Corporation of Lloyd's*, 996 F. 2d 1353, 1363 (2d Cir. 1993)); *see also Infectious Disease Solutions, PC v. Synamed*, No. 1:07-CV-0211-WSD, 2007 WL 2454093, at *3 (N.D. Ga. Aug. 23, 2007).

The forum selection clause in *Bremen* arose in the context of a negotiated commercial contract. The Supreme Court, in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-95 (1991), made clear that forum selection clauses in non-negotiated form contracts between businesses and consumers are equally enforceable. Indeed, *Carnival* made clear that a plaintiff carries a "heavy burden of proof" to invalidate a forum selection clause on grounds of unfairness or the inconvenience of litigating in the pre-selected forum. *Id.* at 595.

Here, Plaintiff alleges no facts to support a conclusion that the forum selection clause resulted from fraud or overreaching. Notably, allegations of fraud in the inducement to the contract as a whole cannot void a forum selection clause; rather, as the Eleventh Circuit, quoting the Supreme Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), explained, claims of fraud or overreaching must go to the procurement of the party's agreement specifically to the *forum selection clause* itself. *Lipcon*, 148 F.3d at 1296 ("an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion") (quoting *Scherk*, 417 U.S. at 519 n.14) (emphasis in *Scherk*). "By requiring the plaintiff specifically to allege that the choice clause is unenforceable, courts may ensure that more general claims of fraud will be litigated *in the chosen forum*, in accordance with the contractual expectations of the parties." *Lipcon*, 148 F.3d at 1296 (emphasis in original).

In this case, Plaintiff's allegation, on information and belief, that Microsoft "fraudulently induced a contractual relationship" between the parties is an entirely general assertion relating to the formation of the contract as a whole. Plaintiff makes no allegation whatsoever that there was fraud or overreaching involved in specifically procuring Silvario Garcia's agreement to bring any litigation in Washington. Under *Scherk* and *Lipcon*, Plaintiff's allegations are insufficient to invalidate the forum selection clauses in the Xbox LIVE Terms of Service.

Lipcon's second and third bases for "unreasonableness" can be dismissed almost out of hand. Plaintiff cannot contend that litigating this matter in the Western District of Washington would be so seriously inconvenient that it would, "for all practical purposes," deprive him of his day in court. *See, e.g.*, *Carnival*, 499 U.S. at 594-95 (Florida venue specified on cruise ticket not "remote alien forum" for Washington resident asserting personal injury claim against cruise line). As explained below, mere financial inconvenience to Plaintiff is insufficient to override a valid forum selection clause. The Supreme Court in *Carnival* recognized strong public policy factors weighing in favor of enforcement of forum selection clauses in consumer contracts, and each of them is applicable here:

> Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. See *The Bremen,* 407 U.S., at 13, and n. 15, 92 S.Ct., at 1915, and n. 15; *Hodes,* 858 F.2d, at 913. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. See *Stewart Organization,* 487 U.S., at 33, 108 S.Ct., at 2246 (concurring opinion). Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued. Cf. *Northwestern Nat. Ins. Co. v. Donovan,* 916 F.2d 372, 378 (CA7 1990).

Carnival, 499 U.S. at 593-94.

Finally, it would be absurd for Plaintiff to claim any "fundamental unfairness of the chosen law," or that transfer would conflict with a strong public policy of Georgia. First, the substantive law applicable to his claims is, as discussed below, likely to be Georgia law, that is, the law that Plaintiff invoked in his Complaint. Second, to the extent that Plaintiff seeks a class of Georgia residents, there would be no "fundamental unfairness" argument for the same reasons. Third, to the extent that Plaintiff seeks nationwide classes – and notwithstanding his citation of Georgia statutes in his causes of action, *see* Compl. ¶¶ 24-26, 30-32, 36-38, 42-46, 48-50, 54, 57, Plaintiff's class allegations speak in terms of "all others similarly situated" without regard to state, *see* Compl. ¶¶ 13-14 – class action principles would lead to application of the state law of each class member's citizenship. Transfer to the Western District of Washington would not alter this result, nor would it impose fundamental unfairness or conflict with a strong public policy of any state. Finally, this Court recently noted the "federal policy in favor of enforcing forum selection clauses." *Infectious Disease Solutions*, 2007 WL 2454093, at *2 n.2.

Plaintiff has no fundamental unfairness or public policy argument. The parties' forum selection clause is valid and "figures centrally" in the Court's analysis under section 1404(a). As shown below, the balance of the remaining, non-central factors clearly weighs in favor of transfer as well.

C. Plaintiff Cannot Avoid The Forum Selection Clause On Grounds That Silvario Was A Minor.

Plaintiff alleges in paragraph 24 of his Complaint that the agreement establishing the Xbox LIVE subscription at issue in this case is unenforceable under the "Infancy Doctrine" of O.C.G.A. § 13-3-20.[3] Plaintiff's assertion is without merit.

[3] O.C.G.A. § 13-3-20(a) provides that:

First, any effort to avoid the obligations under the Xbox LIVE agreement on grounds that Silvario was a minor when he signed up using Plaintiff's debit card is ineffective because Silvario misrepresented his age as at least 18. Under long-recognized principles of estoppel in Georgia:

> [A] defendant is estopped from exercising his privilege of avoiding a fair and reasonable contract upon the ground of his minority at the time the agreement was made, where it appears that he has received, enjoyed, and consumed its irrestorable benefits, and where it appears that the plaintiff, dealing in good faith, was induced to act to his injury by reason of the false and fraudulent misrepresentation of the defendant with respect to his apparent majority, and that, in view of all the surrounding facts and circumstances, the plaintiff was justified in accepting such representation as true, and was free from fault or negligence on his own part, such as a failure to use all ready means of ascertaining the truth touching the defendant's apparent majority.

Hood v. Duren, 125 S.E. 787, 788 (Ga. Ct. App. 1924); *see also Carney v. Southland Loan Co.*, 88 S.E.2d 805, 806 (Ga. Ct. App. 1955); *Clemons v. Olshine*, 187 S.E. 711, 713-14 (Ga. Ct. App. 1936). This principle applies whether the minor seeking to avoid the contract is a defendant, as in *Hood,* or is a plaintiff. *See Carney*, *supra*

> Generally the contract of a minor is voidable. If in a contractual transaction a minor receives property or other valuable consideration and, after arrival at the age of 18, retains possession of such property or continues to enjoy the benefit of such property or continues to enjoy the benefit of such other valuable consideration, the minor shall have thereby ratified or affirmed the contract and it shall be binding on him or her. Such contractual transaction shall also be binding upon any minor who becomes emancipated by operation of law or pursuant to Article 6 of Chapter 11 of Title 15.

(minor plaintiff who fraudulently represented that he was 22 years old estopped from repudiating contract on ground of minority); *Watters v. Arrington*, 146 S.E. 773, 774 (Ga. App. 1929) (minor plaintiff estopped from avoiding contract where he misrepresented his age to induce defendant to enter contract).

Here, it cannot be disputed that Silvario "received, enjoyed, and consumed [the] irrestorable benefits" of the Xbox LIVE subscription, which was first renewed in September 2005 for a one-year term until the second renewal in September 2006. Further, there is nothing in Plaintiff's Complaint to suggest that Microsoft did anything other than reasonably rely on Silvario's misrepresentation, which was required as a condition of the Xbox LIVE Terms of Use, that the subscriber was at least 18 years old. Indeed, if Plaintiff Francisco Garcia maintains that Silvario was the contracting party, *see, e.g.*, Compl. ¶¶ 8, 24, then Silvario committed a second misrepresentation as to who was the subscriber when he opened the account in his father's name. *See* Smith Decl. Ex. A. Plaintiff should clearly be estopped from asserting that the Xbox LIVE agreement is voidable on grounds of Silvario's minority, when the record establishes that Silvario misrepresented the subscriber to be over 18 and even subscribed under a false name.

Second, entirely consistent with the estoppel principle discussed above, courts routinely enforce forum selection clauses where minors have enjoyed the fruits of the contract. Thus in *Harden v. Am. Airlines*, 178 F.R.D. 583, 587 (M.D. Ala. 1998), the court enforced a forum selection clause against a minor, explaining that "[i]f the minor chooses benefits under the contract, he may not avoid his obligation thereunder." That is exactly what happened here, where Silvario enjoyed Xbox LIVE service for over a year before ultimately canceling it in October 2006.[4]

Finally, Plaintiff does not deny that Silvario entered into a contract with Microsoft. On the contrary, Plaintiff admits that there was a contract that he alleges "was entered into via the internet with an XBOX [sic] computer." Compl. ¶ 8. Therefore, to the extent that Plaintiff will maintain that the contract is voidable under O.C.G.A. §§ 13-3-20 despite Silvario's misrepresentation and his enjoyment of over a year of Xbox LIVE service – or that the contract violates the Statute of Frauds because it allegedly was not in writing, *see* Complaint ¶ 14 – that dispute should be resolved in the forum to which Silvario agreed when entering the contract: the Western District of Washington. Plaintiff does not allege that Microsoft engaged in any wrongful conduct directed at procuring assent to the Washington forum. Under both *Lipcon* and *Scherk*, *supra*, any other dispute relating to the Xbox LIVE subscription at issue in this case must be heard in the contractually designated Washington forum. *See supra* Section III.B.

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[4] *See also Morrow v. Norwegian Cruise Line Ltd.*, 262 F. Supp. 2d 474, 475-76 (M.D. Pa. 2002) (noting that no cases exist releasing a minor from a forum selection clause and holding that four-year-old plaintiff was bound by forum selection clause where she could not "give back, or in any way disgorge, the benefit of her contract," and it would therefore be "inequitable to now release her from the obligations and consequences attached to that benefit"); *Rodriguez v. Class Travel Worldwide, L.L.C.*, No. Civ. A. 99-1706, 2000 WL 222165, at *3 (E.D. La. Feb. 18, 2000) ("[a] minor is not relieved from compliance with the lawful terms of a contract"); *Paster v. Putney Student Travel, Inc.*, No. CV 99-2062, RSWL, 1999 WL 1074120, at *2 (C.D. Cal. June 9, 1999) (enforcing forum selection clause against minor where minor enjoyed benefits of contract); *Igneri v. Carnival Corp.*, No. 95 CV 2859, 1996 WL 68536, at *3 (E.D.N.Y. Feb. 1, 1996) ("a minor is not relieved from compliance with the lawful terms of a passage contract").

D. **The Remaining Section 1404(a) Factors Clearly Favor Transfer.**

The remaining factors courts consider when ruling on a motion to transfer under 28 U.S.C. § 1404(a) are: (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n. 1 (11th Cir. 2005); *Elina Adoption Servs., Inc. v. Carolina Adoption Servs., Inc.*, No. 1:06-CV-2288-WSD, 2007 WL 707356, at *3 (N.D. Ga. Mar. 5, 2007). None of these factors "figures centrally" like the forum selection clause, and each of them either favors transfer, is too weak to justify retention in light of the forum selection clause, or is neutral as to which venue would be preferred.

1. The Efficiency Factors – Convenience Of Parties And Witnesses, And Access To Sources Of Proof – Weigh In Favor Of Transfer.

Proceeding in the Western District of Washington would clearly be more efficient than the Northern District of Georgia. In a case like this, with an individual plaintiff asserting numerous claims on behalf of two proposed classes, discovery – whether relating to a class certification motion or the merits of the case – is bound to be asymmetrical with the major part of the burden and expense falling on the defendant. It would be far less burdensome to proceed in Washington, where virtually all of the defense witnesses and pertinent records and documents exist. Smith Decl. ¶ 12. While Plaintiff may argue that litigation in the Northern District of Georgia would be personally more convenient for *him*, inconvenience to the plaintiff alone is insufficient to support retention of a case, *see, e.g.*, *P & S*, 331 F.3d at 807-08; *American Safety Cas. Ins. Co. v. Bio-Tech Solutions, Inc.*, No. 1:05-1CV-3152-JEC, 2007 WL 951529, at *4 (N.D. Ga. Mar. 26, 2007), especially where the parties agreed to a valid forum selection clause, *id.* at *5. The convenience factor tips clearly towards venue in the Western District of Washington where Microsoft is headquartered.

As this Court concluded in *Elina Adoption Servs.*:

> While the [contractual] forum may be less convenient for Plaintiff, and possibly for some of the witnesses anticipated to be called in this dispute, that inconvenience is outweighed by Plaintiff's express agreement to litigate in a specified forum. In the absence of a showing

> that transfer would, through inconvenience or otherwise, deprive Plaintiffs of a fair adjudication of their dispute, the Court will enforce the forum selection clause.

2007 WL 707356, at *3.

The efficiency factors – the convenience of parties and witnesses, and access to sources of proof – reinforce the conclusion that the Court should transfer this case to the Western District of Washington.

2. The Locus of Operative Facts, And Availability Of Process To Compel Attendance Of Unwilling Witnesses, Are Neutral Or Favor The Washington Venue.

As Plaintiff explains in the Complaint, the contractual relationship at the heart of this case "was entered into via the internet with an XBOX [sic] computer." Compl. ¶ 8. Plaintiff's child, who was presumably in Georgia when he entered into the contract, used Plaintiff's debit card to start an Xbox LIVE account with Microsoft, whose headquarters and principal place of business are in Washington. Compl. ¶¶ 4, 8. As to the formation of the contractual relationship itself, then, the locus of operative facts favors neither Washington nor Georgia, with activity in both states. To the extent, however, that the locus of operative facts can be expected to be where most of the documents and witnesses reside, this factor would favor Washington. In any event, this factor does not tip towards Georgia, and is therefore unable to overcome the "central" factor – the forum selection clause – favoring Washington as discussed above.

As to the availability of process to compel the attendance of unwilling witnesses, it cannot be said at this time if there would even be any unwilling witnesses. If they tended to be in the area around Microsoft's headquarters in Redmond, Washington, which would be consistent with the expectation that most of the witnesses or documents would be there, this factor would tip towards a Washington venue.

3. Litigation Cost is an Insufficient Justification to Deny Transfer

While Microsoft has more financial resources than Plaintiff, this factor alone is insufficient to justify retention of this case. As the Eleventh Circuit explained in *P & S*, "the financial difficulty that a party might have in litigating in the selected forum is not a sufficient ground by itself for refusal to enforce a valid forum selection clause." *P & S*, 331 F.3d at 807-08 (collecting cases). Silvario Garcia agreed to litigate the dispute in Washington under the forum selection clause. Plaintiff asserts claims on his son's behalf and cannot suddenly walk away from his son's agreement to litigate in Washington because he now claims litigation in the pre-selected forum to be costly.

4. The Parties' Choice of Law Agreement Is Insufficient to Trump Their Express Agreement to Litigate Disputes in Washington

The parties' Terms of Use to which Silvario Garcia agreed provide that "[c]laims for enforcement, breach or violation of duties or rights under this

Agreement will be adjudicated under the laws of the State of Washington," but that "[a]ll other claims, including, without limitation, claims under or for violation of state consumer protection laws, unfair competition laws, and in tort, will be adjudicated under the laws of your state of residence in the United States." *See* Smith Decl. Ex. B ¶ 16.

Because Plaintiff does not assert claims for breach of contract, Georgia law may well govern his claims. While Georgia courts are likely to be more familiar with Georgia law than Washington courts, federal courts in Washington, like federal courts throughout the nation, are well-equipped to apply the law of states other than where they sit, and routinely interpret and apply the law of sister states. And as noted *supra* in Section III.B, if Plaintiff seeks a nationwide class, the laws of all fifty states are likely to apply in this case, eliminating any weight on the Georgia side of the balance attributable to the choice of law. The choice of law clause, which on a section 1404(a) motion involving a forum selection clause does not "figure centrally" in the Court's analysis, can hardly convert this case into the "exceptional case[]" that justifies overriding the parties' agreement on venue. *Stewart Org.*, 487 U.S. at 33.

5. Plaintiff's Choice Of Forum Deserves Little Or No Weight.

This Court recently explained that "[w]here a forum selection clause exists, Plaintiff's choice of venue – usually a strong factor opposing transfer – is not accorded deference." *Elina Adoption Servs.*, 2007 WL 707356, at *2; *see also Am.*

Safety Cas. Ins. Co. v. Bio-Tech Solutions, Inc., No. 1:05-1CV-3152-JEC, 2007 WL 951529, at *6 (N.D. Ga. Mar. 26, 2007) (quoting *Grey v. Cont'l Mktg. Assocs.*, 315 F. Supp. 826, 831 (N.D. Ga. 1970)). Indeed, where there is a forum selection clause, "there is 'no reason why a court should accord deference to the forum in which plaintiff filed its action. Such deference . . . would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system." *Rode v. St. Judge Medical, S.C., Inc.*, No. 1:06-cv-02448-WSD, 2006 WL 3762065, at *2 (N.D. Ga. Dec. 20, 2006) (quoting *Ricoh*, 870 F.2d at 573). Other courts agree. *See, e.g.*, *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) (deference to plaintiff's choice of forum "is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue"); *Shore Slurry Seal, Inc. v. CMI Corp.*, 964 F. Supp. 152, 156 (D.N.J. 1997) (valid forum selection clause "is treated as a manifestation of the parties' preferences as to a convenient forum.").[5] Further, to the extent Plaintiff seeks nationwide classes, *see supra* Section III.B, there is additional reason not to defer to a Georgia forum. As the Supreme Court has long recognized,

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[5] *See also Outek Caribbean Distributors, Inc. v. Echo, Inc.*, 206 F. Supp. 2d 263, 266 (D.P.R. 2002); *Knudsen v. Elite Trading Group, Inc.*, No. CV-99-1497-HU, 2000 WL 488481, at *5 (D. Or. Mar. 17, 2000); *Strategic Marketing & Communications v. Kmart*, 41 F. Supp. 2d 268, 273 (S.D.N.Y. 1998); *Micro-Assist, Inc. v. Cherry Communications, Inc.*, 961 F. Supp. 462, 465 (E.D.N.Y. 1997); *Memo Associates, Inc. v. Homeowners Marketing Services Int'l, Inc.*, 942 F. Supp. 1025, 1028 (E.D. Pa. 1996); *Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278

"where there are hundreds of potential plaintiffs . . . all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

In sum, transferring this action to Washington does *not* deprive Silvario Garcia of his choice of forum. Rather, an order transferring this case merely implements the choice Silvario Garcia made at the inception of the contractual relationship. *P & S*, 331 F.3d at 807 (citing *Ricoh*, 870 F.2d at 573) ("By enforcing the contractual forum, the Court is not attempting to limit the plaintiff's usual right to choose its forum, but is enforcing the forum that the plaintiff has already chosen.") The Court should accord no deference to Plaintiff's about-face decision to file suit in Georgia.

6. Trial Efficiency and the Interests of Justice Favor Transfer.

Where, as here, the motion is brought at the inception of a case, before discovery begins, no potential for delay or prejudice exists. Moreover, all or most of Microsoft's witnesses and documents are located in Washington. Smith Decl. ¶ 12. Finally, and most importantly for this factor, the parties already agreed to litigate this controversy in Washington and therefore, in the interests of justice, this Court should honor that agreement. *Stewart Org.,* 810 F.2d 1066, 1075 (11th Cir. 1987) ("Where,

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(S.D.N.Y. 1992).

as here, the non-movant has not shown that it would be unjust to honor a forum selection clause that it has freely given, 'the interest of justice' requires that the non-movant be held to its promise.") (Tjoflat, J., concurring).

IV. CONCLUSION

For all of the foregoing reasons, Microsoft respectfully requests that the Court transfer this case to the United States District Court for the Western District of Washington.

DATED this 15th day of October, 2007.

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L.R. 7.1(D) CERTIFICATION

I hereby certify that Defendant's Motion to Transfer has been prepared in Times New Roman font, 14 point, pursuant to L.R. 5.1(C).

/s/ Kristy Brown
Kristine McAlister Brown

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2007, I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 15th day of October, 2007

/s/ Kristy Brown
Kristine McAlister Brown